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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1027

DAN LEE WHITE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on December 11, 1968.

CITATIONS TO OPINIONS BELOW

Trial in the United States District Court for the Southern District of Iowa, Central Division, was to a jury and no decision of the District Court is reported. Instructions issued by the District Court to the jury, pertinent to this Petition, are printed in Appendix hereto, infra, pages 4a-5a. The opinion of the Court of Appeals is set out in the Appendix hereto, infra, page 1a-5a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 11, 1968. On January 10, 1969, Honorable Byron R. White, Associate Justice, extended the time for filing Petition for a Writ of Certiorari to and including February 9, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Whether the District Court erred in overruling Petitioner's motions for a judgment of acquittal which contended that Petitioner, as a matter of law, was not guilty of wilfully and knowingly failing and refusing to report for induction as charged in the indictment.

STATUTE INVOLVED

Petitioner was indicted for alleged violation of Title 50 App. U.S.C. Section 462.

STATEMENT

The Grand Jury for the United States District Court for the Southern District of Iowa, Central Division, indicted Petitioner for wilfully and knowingly failing and neglecting to comply with a Selective Service Board Order that he report for induction into the Armed Services. The offense was alleged to have continued from October 3, 1966, up to and including the date of indictment, July 18, 1967.

Petitioner pled not guilty and the case was tried before Honorable Roy L. Stephenson and a Jury, resulting in a judgment of guilty and a sentence to five years imprisonment.

Petitioner was issued an order to report on October 3, 1966, for induction. After receiving the order but before

the date for induction, Petitioner requested, received, and submitted to his Local Selective Service Board a special form provided for applicants claiming the status of conscientious objector. He, also, returned the Order to Report for Induction.

Between the return of the induction order to the Board with the conscientious objector form, and the notification to Petitioner by the Board on October 31, 1966, that his application had been considered and found not to merit reconsideration of his classification, there were no instructions or communications from the Board to Petitioner.

The Trial Court held as a matter of law that the Petitioner was not guilty of wilfully and knowingly failing to report and submit to induction between the time that he was originally to have reported and the time that the Selective Service Board notified him that his conscientious objector application had been denied. Appendix Pages 4a-5a.

The October 31, 1966, letter advised Petitioner to report to his nearest Draft Board and request a transfer for induction, and included the original order to report for induction which directed him to report on October 3, 1966. Appendix pages 2a-3a.

Petitioner's claim is that the directives he received from his Local Board were confusing and misleading because the letter of October 31, did not order him to report for induction but ordered him to report to a draft board and request a transfer of his place of induction from Iowa to his residence in New York. Failure to comply with this order is not a crime. 50 App. U.S.C. § 462.

The Court of Appeals based its opinion upon the doctrine that an induction order imposes upon the registrant a continuing duty to submit to induction, United States vs. Prince, 398 F. 2d 686 (2nd Circuit 1968); Silverman vs. United States, 220 F. 2d 36 (8th Circuit 1955) and that return of the induction order to Petitioner by the Local

Board with its letter of October 31st was sufficient to create the requisite criminal intent which the District Court found not present between the time he returned the induction order and October 31.

But, Petitioner contends that the Court of Appeals decision and the rulings of the District Court fail to give sufficient weight to the fact that it was impossible for Petitioner to comply with the returned induction order as it directed him to report on October 3, 1968, a date already past.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is directly in conflict with the decision of the Ninth Circuit in Graves v. United States, 242 F. 2d 878 (1958) and the Third Circuit in United States v. Mancuso, 130 F. 2d 90 (1943).

In Graves v. United States, supra, 252 F. 2d 878, a selective service registrant was held not guilty of failing to be inducted because the government had told him to perform some other act.

Graves sought postponements of an induction order to attend to private business. Upon the assurance of the Chairman of his selective service board that he would be given a sixty day extension, he became unreachable as a necessary result of his business. Subsequent induction orders counter-manding the Chairman's assurance failed to reach him. Upon arriving home, Graves went, with his mother, to the selective service board, where they were told he should not report for induction, but should wait to be arrested.

The government contended Graves had a continuing duty to report which he knowingly violated during this waiting. In reversing the judgment of conviction, the Court of Appeals held the words "wilfully and knowingly" require a culpable intent, and that Graves was justified,

from what he was told by his selective service board, in believing he had no duty to report after returning from his business. Graves v. United States, supra, 252 F. 2d 878, 882-883.

The registrant in United States v. Mancuso was sent a letter ordering him to report for induction, after an original order had been held in abeyance by a District Court injunction. The Court of Appeals held that the letter was insufficient to support a criminal conviction for refusal to be inducted.

The Record contains no evidence that the government ever informed Petitioner he had any outstanding duty other than that contained in the letter of October 31, 1967, to go to a selective service board in New York and ask for a transfer of his place of induction, pursuant to 32 C.F.R. § 1632.9. But this procedure is discretionary with the registrant.

The failure to report for induction, to support a criminal conviction, must be deliberate and with knowledge and not something which is merely negligent, careless, or inadvertant. Browder v. United States, 312 U.S. 335, 341. It must have been done without ground for belief it was lawful, with bad purpose, and an "evil motive". United States v. Murdock, 290 U.S. 389, 394.

An intent to invade the law is a necessary element of the offense. Silverman v. United States, 220 F. 2d 36 (8th Circuit 1955). Proof of an intentional failure requires evidence that a defendant knew what was wanted of him; that he had an awareness of restrictions of the statute under which he was indicted or a reckless disregard of the statute. United States v. Inciso, 292 F. 2d 374, 380 (7th Circuit 1961). Regulations making a duty to report "continuing" cannot eliminate this requirement. United States v. Trypuc, 136 F. 2d 900 (2nd Circuit 1943).

Clearly, the communications to Petitioner from the government so confused his responsibilities as to prevent proof of failure to knowingly and intentionally report.

The instant case in which the selective service system told Petitioner to do one act, and then prosecuted him for not doing another act, demonstrates the need for attention by the Supreme Court to the administrative procedures and practices of the system, especially at the level of Local Selective Service Boards.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,176

DAN LEE WHITE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Before VOGEL, LAY and BRIGHT, Circuit Judges.

BRIGHT, Circuit Judge.

Appellant Dan L. White was found guilty, after a jury trial, of willfully failing to comply with an order of his draft board directing him to report for and submit to induction into the armed forces of the United States, such refusal being in violation of § 12 of the Universal Military Training and Service Act, 50 U.S.C. App. § 462.[1] He was sentenced to five years imprisonment and has appealed. We affirm the conviction.

White first registered with his Des Moines local board in March of 1959. On July 24, 1964, his "student deferment" classification was changed to I-A making him avail-

[1] The applicable statute reads in pertinent part:

"Any . . . person . . . who . . . evades . . . service in the armed forces or any requirements of this title . . . or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction . . . be punished by imprisonment . . ."

able for military service. On September 2, 1966,[2] the draft board mailed to White in New York[3] an order requiring him to report for induction on October 3 at Fort Des Moines, Iowa. On September 10, White mailed the induction order back to the local board and wrote that he would not comply "without my legitimate right of appeal". Time for appeal from the 1964 I-A classification had expired and the local board so advised him.[4] On September 18, White wrote to the local board requesting a special conscientious objector form SSS 150 and the local board mailed him this form approximately eight days later. White returned the completed form, stating his conscientious objector claim, to the local board on October 6. The board considered the claim at a meeting on October 28 and voted not to reopen his classification.[5] Three days after the meeting, the following letter was mailed White:

"October 31, 1966

TO Dan Lee White, 1280 Walton Ave., Apt 31,
Bronx 52, New York

FROM Polk County Local Board No. 13-128

Please be advised that SSS Form 150, Conscientious Objector Form, was considered by the members of this Local Board at the October 28, 1966 meeting, and it was their unanimous opinion that the information presented did not merit reopening.

---

[2] All pertinent correspondence between White and his draft board occurred in 1966.

[3] White first registered for the draft in Des Moines. He later moved to New York but the Iowa local Selective Service board retained jurisdiction over him.

[4] Pursuant to 32 C.F.R. § 1626.2, an appeal, except under exceptional circumstances not here present, must be taken within thirty days after notice of classification has been mailed.

[5] Appellant does not take issue with the propriety of this action.

Your Order to Report for Induction is hereby returned. Please report to the nearest draft board and request a transfer for Induction.

BY DIRECTION OF THE LOCAL BOARD

Dorothy Adams, Clerk 13-128"

White at no time reported for induction. He did write the board on December 19 saying in part: "I cannot in any manner partake in the Armed Forces".[6] An indictment returned July 18, 1967, charged that, from October 3, 1966, up to and including the day of the indictment, White willfully and knowingly failed "to comply with an order of his local board to report for and submit to induction into the armed forces of the United States".

In this appeal, White claims that the letter ordered him to do something other than report for induction; namely, to request a transfer for induction.[7] A failure to request

---

[6] White's letter of December 19 gave the following reasons for his refusal:

> "In reply to your recent pronouncement on my conscience, I must reiterate that in all good conscience I cannot in any manner partake in the Armed Forces. May history record that I believe that the U.S. Armed Forces are engaged in genocide, perpetual racism and crimes against Mankind. Jesus would not wear the 'green fatiques' and neither shall I. 'To kill or be killed' is the standard euphemism for a 'license to murder.' Any accomodation with the Armed Forces whether with the Medical Corp or Marine Corp is a regression from Man's noble destination, i.e., emulation of Good, i.e., God. (sic) Please be advised that I am mentally and physically unfit for any life in the Armed Forces. Politically I am of the persuasion that the world will be better off once the U.S. Armed Forces, the instrument of racist capitalism, are drastically curtailed. At this crucial moment in history when we observe a heroic struggle of the Vietnamese people to unshackled the chains of racist American oppression, young Americans who know their cause is just, must lend all moral support possible, even to face jail to assert their moral conscience." (sic)

[7] Such a transfer is allowed under the Selective Service regulations for the convenience of the registrant. 32 C.F.R. § 1632.9.

a transfer does not constitute a crime. Therefore, appellant reasons, the court should have entered a judgment of acquittal as a matter of law. Crucial to the resolution of this question is whether the order requiring White to report for induction on October 3 required him to act subsequent to that date.

An induction order imposes a continuing duty on the registrant to submit to induction. United States v. Prince, 398 F. 2d 686 (2nd Cir. 1968); Silverman v. United States, 220 F. 2d 36 (8th Cir. 1955). This Court has said:

> "there was only one offense charged, that offense was failure to report for induction. By the Selective Service Regulations, § 1642.2, 32 C.F.R., it is made a continuing offense. No assault is made upon this regulation. The nature of the offense charged is such that it may upon proper proof be a continuing one." Silverman at 220 F.2d 39.

The pertinent Selective Service regulations provide:

> "When it becomes the duty of a registrant or other person to perform an act, . . . the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act . . . shall in no way operate as a waiver of that continuing duty." 32 C.F.R. § 1642.2.

> "Regardless of the time when or the circumstances under which a registrant fails or has failed to report for induction pursuant to an Order to Report for Induction . . . it shall thereafter be his continuing duty from day to day to report for induction . . . to his own local board, and to each local board whose area he enters or in whose area he remains." 32 C.F.R. § 1642.15.

White's contumacious return of the induction order on September 10 did not in any way suspend the effectiveness of that order. Upon receipt of the returned order and White's letter claiming conscientious objector status, the board did not terminate or suspend the induction order.

The trial court instructed the jury, inter alia, that

White could not be found guilty of failing to report for induction during the period from October 3 to the date of his receipt of notice that his claim had been rejected. This instruction was based on the trial court's conclusion that White did not possess the requisite criminal intent to be found guilty of refusing to report for induction during that period. His continued refusal to report after being notified of the board's rejection of his claim supplied the necessary evidence of criminal intent and supports the conviction.

The board's letter of October 31 and accompanying induction order was in no way confusing and clearly conveyed the message that White was required to immediately report for induction. Under the heading: "IMPORTANT NOTICE (Read Each Paragraph Carefully)", the induction order reads in part:

> "Willful failure to report at the place and hour of the day named in this Order subjects the violator to fine and imprisonment. Bring this Order with you when you report. If you are so far from your own local board that reporting in compliance with this Order will be a serious hardship, go immediately to any local board and make written request for transfer of your delivery for induction, taking this Order with you."

Dan L. White is a person of intelligence, possessed of a college degree, and had been engaged in responsible employment. After reviewing the entire record, we are satisfied that the correspondence of October 31 in context would in no way be confusing or misleading to a person of ordinary intelligence. There is no evidence in the record that White was in fact confused or misled in any way. Under these circumstances, the jury was entitled to conclude that he was guilty as charged.

Affirmed.

A true copy.
Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

MOTION FOR JUDGMENT OF ACQUITTAL AND NEW TRIAL

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
Central Division

Criminal No. 4-1218-C

UNITED STATES OF AMERICA,
Plaintiff,

v.

DAN L. WHITE,
Defendant.

MOTION FOR JUDGMENT OF ACQUITTAL AND NEW TRIAL

Defendant states:

1. The Motion for a Judgment of Acquittal made at the close of the plaintiff's case in chief, and the defendant's case in chief, are renewed as if fully set out herein.

2. The evidence shows that the only induction order issued to defendant ordered him to report for induction October 3, 1966. The Court instructed the jury that from that date until October 31, 1966, defendant is not guilty of refusing to report for induction because the plaintiff was then considering a change in defendant's status to that of conscientious objector. At no time subsequent to this period was defendant ordered to report for induction subsequent to October 3, 1966. To enter a judgment of conviction against the defendant when the conduct of the plaintiff in this case was so clearly misleading as to defendant's obligations, deprives defendant of due process of law.

3. The evidence fails to show plaintiff reached a conclusion, or even considered, the question of when defendant's

claim of conscientious objector matured, which plaintiff was required to do by U. S. v. Geary, 368 F. 2d 144.

4. To reach a verdict of guilty based upon a change of status created by the letter sent defendant by plaintiff on October 31, 1966, gives that letter status as an Order to Report for Induction which it clearly was not, and, as a matter of law, cannot be. U. S. v. Mancusco, 139 F. 2d 950.

5. By admitting into evidence defendant's testimony as to the relation between defendant's conscientious objector application, and his apprehension and beliefs about racial discrimination in the armed forces, yet denying defendant's motion to discover reports of plaintiff's investigations as to such discrimination, and, further, failing to admit expert testimony as to the relationship in defendant's mind between such belief and his objection to serving in the armed forces, defendant was denied the ability to substantiate his claim once made. He was thus left before the jury as one presenting a claim without basis in fact and thus deprived of a fair trial with opportunity to present his full case.

6. By virtue of Jury Instruction 12A, and the evidence, plaintiff has clearly, as a matter of law, failed to prove defendant guilty of refusing to report for induction from October 3, 1966, until the date of the indictment as alleged in the indictment.

WHEREFORE, defendant moves for a judgment of acquittal or, failing that, an order for a new trial pursuant to 18 USCA Rule 29(c) and 18 USCA Rule 33.

JESSE, LE TOURNEAU & JOHNSTON
By /s/ Dan Johnston
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DISTRICT COURT ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
Central Division

Criminal No. 4-1218-C

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAN L. WHITE,
Defendant.

ORDER

This matter is now before the Court upon the motions of defendant Dan L. White for judgment of acquittal or, failing that, an order for a new trial. Upon consideration of the motions and the record herein, the Court finds that said motions should be denied.

IT IS ORDERED that the defendant's motion for judgment of acquittal is hereby denied.

IT IS FURTHER ORDERED that defendant's motion for a new trial is hereby denied.

Dated this 16th day of November, 1967.

/s/ Roy L. Stephenson
Chief Judge

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1027

DAN LEE WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–5a) is reported at 403 F. 2d 1005.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1968. Mr. Justice White extended the time for filing a petition for a writ of certiorari to February 9, 1969, and the petition was filed on February 8, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

335-450—69

QUESTION PRESENTED

Whether petitioner was adequately notified of his duty to report for induction under the Selective Service Act.

REGULATIONS INVOLVED

32 C.F.R. 1642.2 provides, in pertinent part:

> When it becomes the duty of a registrant or other person to perform an act, * * * the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act * * * shall in no way operate as a waiver of that continuing duty.

32 C.F.R. 1642.15 provides, in pertinent part:

> Regardless of the time when or the circumstances under which a registrant fails or has failed to report for induction pursuant to an Order to Report for Induction * * * it shall thereafter be his continuing duty from day to day to report for induction * * * to his own local board, and to each local board whose area he enters or in whose area he remains.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of Iowa, petitioner was convicted of willfully failing to comply with an order of his Selective Service board directing him to report for and submit to induction into the Armed Forces of the United States, in violation of 50 U.S.C. App. 462. He was sentenced to imprisonment for five years (R. 1, 31, 42). The court of appeals affirmed.

Petitioner registered with his Des Moines local draft board on March 16, 1959. His II–S student de-

ferment classification was changed to I–A on July 24, 1964, and he was duly notified of the change (Ford Tr. 4–6).[1] He was again classified as I–A and given notice thereof on August 27, 1964. He passed his physical examination and was so notified on May 31, 1966 (Ford Tr. 8–10). On September 2, 1966, the board mailed to petitioner in New York City an order requiring him to report for induction at Fort Des Moines, Iowa, on October 3, 1966.

On September 10, 1966, petitioner returned to the board his Order to Report for Induction and sought to appeal therefrom. The board replied that such an appeal was not timely, since over 30 days had elapsed since he had been given his I–A classification (Ford Tr. 12–13). On September 18, petitioner requested and was sent a conscientious objector form. Petitioner completed the form and returned it to the board on October 6—three days after the date on which he was ordered to report for induction (Ford Tr. 14–15). On October 31, 1966, the clerk of the board wrote petitioner (Ford Tr. 16–17):

> Please be advised that SSS Form 150, Conscientious Objector Form, was considered by the members of this Local Board at the October 28, 1966 meeting, and it was their unanimous opinion that the information presented did not merit reopening.

[1] "Ford Tr." refers to the transcript of the testimony of Mrs. Shirley Ford, clerk of the local board, which is on file with the Clerk of this Court. "White Tr." refers to the testimony of petitioner, which we are lodging with the Clerk of this Court.

> Your Order to Report for Induction is hereby returned. Please report to the nearest draft board and request a transfer for induction.

Petitioner never reported for induction.

Petitioner testified in his own behalf that he graduated from college in May 1964 and was employed by the New York City Department of Welfare (White Tr. 2–5). He had read the induction order, including the violation and penalty section, and understood it (White Tr. 17–18). He had replied on September 10, 1966, complaining of prejudice against Negroes in the Armed Forces and particularly of the treatment received by his father and brother when they were in the service (White Tr. 19–20). After the board, on October 31, 1966, rejected his application for conscientious objector status, he had replied, on December 19, 1966, that, because of his conscientious beliefs, he could not serve in the Armed Forces in any manner (White Tr. 27–28; see Pet. App. 3a, n. 6). He had concluded after talking with his brother, who had been in the service, that "for a colored man, the Armed Forces was simply no place to be" (White Tr. 54).[2]

ARGUMENT

Petitioner's contention that as a matter of law his conduct in failing and refusing to submit to induction was not willful and knowing finds no support in

[2] Following the verdict of guilty, the court told petitioner at the sentencing hearing that if he saw fit to agree to enter the Armed Forces thereafter the court would either suspend sentence or impose a sentence which would permit petitioner to submit to induction. Petitioner refused to accept the court's offer (see R. 53 *et seq.*).

the record. There was no ambiguity in the order of September 2, 1966, that petitioner report for induction at Fort Des Moines, Iowa, on the following October 3. Petitioner, a college graduate, admitted that he understood that order (*supra*, p. 4). Instead of complying, petitioner chose to apply for conscientious objector status after the date he was ordered to report. The leniency of the board in failing to have a prosecution instituted immediately and in giving petitioner another chance to report in no way condoned his failure to do so. Nor did it terminate or suspend the effectiveness of the induction order, as the court below noted (Pet. App. 4a).

Even if petitioner was justified in awaiting a response to his belated conscientious objector claim, as the trial court assumed (see Pet. App. 4a–5a), an induction order, as noted by the court below (Pet. App. 4a), imposes a continuing duty on the registrant to submit to induction. *United States* v. *Prince*, 398 F. 2d 686 (C.A. 2), certiorari denied, 393 U.S. 946; *Silverman* v. *United States*, 220 F. 2d 36 (C.A. 8); *United States* v. *Bendik*, 220 F. 2d 249 (C.A. 2).[3] Petitioner's claim to have been confused by the instructions received in the board's letter of October 31, 1966, is belied by his reply thereto which, in effect, told the board that he did not intend to submit to induction under any circumstances. The issue of willfulness was properly submitted to the jury under instructions not here challenged, and has been resolved

[3] See 32 C.F.R. 1642.2 and 32 C.F.R. 1642.15 (*supra*, p. 2), which provide both generally and particularly that the obligation here involved was of a continuing nature.

adversely to petitioner's contention. He was charged with failing to report for induction from October 3, 1966, up to the date of the indictment—July 18, 1967 (Pet. App. 3a). As the court below correctly concluded, "His continued refusal to report after being notified of the board's rejection of his claim supplied the necessary evidence of criminal intent and supports the conviction" (Pet. App. 5a).

CONCLUSION

It is therefore respectfully submitted that the petitin for a writ of certiorari should be denied.

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MARCH 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969